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No. 85-5972

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS N. SCHIRO,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by that Court in Cause No. 1084 S 423.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Indiana, Cause No. 1084 S 423, is reported at 479 N.E.2d 556 (Ind. 1985) and is included by Petitioner in his brief as Appendix A.

STATEMENT OF THE CASE

Petitioner was charged and convicted of Murder While Committing or Attempting to Commit Rape. The State of Indiana charged the statutory aggravating circumstance that the killing while committing or attempting to commit that specified felony was knowing and intentional. Indiana Code § 35-50-2-9. Pursuant to that same statute, the question of the imposition of the death penalty was put to the jury for their unanimous advisory verdict. The jury recommended that the death penalty not be imposed. However, the trial court, as the sole final sentencing authority under that statute, declined to follow the recommendation of the jury, and entered his findings and judgment imposing the death penalty. The trial court judge stated that he had observed the Defendant continually make a rocking motion of his body at time when the jury was present but not when the jury was absent, and that there were psychiatric opinions of record stating that in the past Schiro had affected rocking motions in order to avoid the consequences of his actions by thereby creating the impression of mental disturbance. A direct appeal ensued, in which the Indiana Supreme Court reviewed the conviction and the death sentence and affirmed both. Schiro v. State Ind., 451 N.E.2d 1047 (1983). Among the issues raised in that direct appeal were issues related to the override of the jury verdict, including the issue whether there were proper standards under which the Indiana Courts could exercise their discretion to reject a jury's recommendation of mercy.

Following the adverse decision of the Supreme Court of Indiana in his direct appeal, Petitioner brought the matter directly to this court by means of a Petition for Writ of Certiorari, which Petition this Court denied. Schiro v. Indiana, cert. den. ___ U.S. ___, 103 S.Ct. 510, 78 L.Ed.2d 699. That Petition did not raise the issue of the propriety of the standards under which a trial court may disregard a jury's life recommendation.

The current cause was initiated by Petitioner by his filing in the Court of his conviction of a "Petition for Post-Conviction Relief", pursuant to Indiana Rules of Post-Conviction Relief, Rule P.C. 1.[1] The issues raised in that Petition were (1) whether the trial court judge could properly have judicially observed the times and nature of such demeanor on the part of the Defendant and use it in reaching his sentence, and (2) whether there was evidence that showed a bias on the part of the trial court judge. The petition for post-conviction relief was denied and Defendant undertook the appeal in the Indiana Supreme Court from that denial. That appeal raised two issues:

[1]It was not heard by the same judge, however. Petitioner obtained a change of judge under the provisions of that rule.

(1) whether the trial court was biased and/or had improperly considered his observations of the Defendant's actions and demeanor in court both in the presence of the jury and out of its presence; and (2) whether it was ineffective representation of counsel that certain potential verdict forms were not submitted.[2] The Indiana Supreme Court affirmed that denial (thus declining to grant relief). It is the opinion doing so that is under review in the instant Petition for Writ of Certiorari.

The underlying facts of the crime are as follows: On February 5, 1981, Laura Luebbehusen, a woman 28 years old, was found dead in her home. Blood covered the walls and floor, and belongings were thrown and scattered about the house. A broken liquor bottle and broken iron were discovered among the items.

Two days later, Luebbenhusen's car was discovered a block away from the "Second Chance Halfway House" in Evansville, Indiana. Thomas Schiro, Petitioner, one of the residents there, unexpectedly sought out the house's director and admitted the crime to him.[3] After Schiro was arrested, he told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had had intercourse with Luebbehusen both before and after the killing.

Schiro's girlfriend recounted that on February 7, 1981, he told her he had killed a woman. He told the girlfriend, Ms. Lee, that he had pretended his car had broken down, got into the house to use a telephone, and asked to use the bathroom. He came out of the bathroom exposed. To trick the woman, he falsely told her that he was gay and had a bet with a friend that he could not have intercourse. Luebbehusen was actually gay, and

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[2]As to this issue, which does not appear in the instant Petition, the Indiana Court determined that as the jury were instructed as to all the potential verdicts any such error would have not been prejudicial.

[3]The voluntariness of that admission is not in issue.

with a dislike of men. Under this purported commonality of interest, the two had a conversation, and proceeded to experimentation with sexual devices. Schiro found that painful, and had intercourse with the woman. She attempted to leave, but he stopped her and raped her a second time. He left the house, but returned and raped her again. He fell asleep, and woke up to find her attempting to leave. He made her stay, and she fell asleep. He hit her on the head with a vodka bottle, then with an iron, and strangled her to death. Then he undressed her, assaulted the body sexually, and chewed on several parts of the body. This account of the woman's death was consistent with the findings of the pathologist who examined Laura Luebbehusen's body.

As insanity was raised as a defense, much information was adduced concerning Defendant's background and character. Schiro was described as a sexual sadist, with a poor prognosis of recovery. He was attracted to aggressive pornography, otherwise known as rape pornography, in which women appear to enjoy a violent assault despite the evident pain. He was addicted to masturbation, progressively more and more bizarre forms. He recounted several stories of exposure of himself, culminating in ejaculation either on a victim's window or (if he had secretly gained access to her room) on her face while she still slept. He provided the psychiatrist with a 30-page written document detailing this crime. He recounted twenty-three instances of various sexual assaults. He said that he preferred that his victim not move, because of his desire to practice necrophilia. He wanted to work for a funeral home to have sex with the bodies of dead women.

Linda Summerfield, a victim of one of these assaults, said that he had pretended to need to get warm in her house about six weeks before the Luebbehusen murder, and raped her three times, threatening to kill her children if she resisted. He also liked to hold his girlfriend's baby with his hand over

its face until it stopped breathing, or hold that baby under water in the bathtub, and then resuscitate it.

Four psychiatrists testified that Schiro was legally sane, that is, able to tell the difference between right and wrong and conform his conduct to the requirements of the law at the time of the crime. One of the psychiatrist's witnesses observed of record that Schiro exhibited what the observer characterized as a parody of the behavior of a mentally ill person, evidently intended to convince others that he was insane.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In his recitation of the question presented, Petitioner raises the following issue: "Whether, after Spaziano v. Florida, a State may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty without offending the constitutional requirement of reliability in capital sentencing procedures." (Brief, page 4).

The State of Indiana responds to the Petition with the following two issues:

(I) Whether the ground asserted by Petitioner is properly before the Court in this action.

(II) Whether there are constitutionally sufficient standards in Indiana governing the override of jury recommendation against the death penalty and in appellate review of such a judgment.

SUMMARY OF THE ARGUMENT

I. Since the issue of the standards to be used by a trial court in overriding a jury recommendation against the death penalty was not presented by Petitioner in his post-conviction petition or discussed by the State Court in the action below, jurisdiction to hear that issue is not raised by this Petition.

II. Indiana's procedure properly limits the trial court in its exercise of sentencing discretion, including overriding a

jury recommendation so as to prevent arbitrary and capricious imposition of the death penalty, and affords meaningful appellate review of such imposition.

REASONS FOR DENIAL OF THE WRIT

I.

THE GROUND CLAIMED BY PETITIONER IS NOT PROPERLY BEFORE THIS COURT

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 which, in pertinent part, reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

It appears central to the use of the writ that it serves as a means to review a final judgment or decree. Petitioner here seeks to invoke the writ to "review" an issue which was not presented to nor discussed by the Supreme Court of Indiana in the underlying appeal from denial of Post-Conviction relief. (This issue, what standards are to be applied by a trial court in overriding a jury's recommendation of mercy in a capital case, was only presented to the Indiana Supreme Court in the separate direct appeal, and not brought to this Court in the Petition for Writ of Certiorari therefrom. Schiro v. State, Ind., 451 N.E.2d 1047 (1983), cert. den., ___ U.S. ___, 104 S.Ct. 510, 78 L.Ed.2d 699.)

This Court has held that in an action under 28 U.S.C. § 1257(3), a petitioner must have "specially set up or claimed under the Constitution . . . of . . . the United States" that

right which he seeks to have this Court enforce. This Court's Rule 21.1(h) requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). The instant petition only asserts baldly that the rights were asserted below in an action resulting in denial of petition for post-conviction relief, a judgment in a civil action. (Petition, pp. 1-2). However, his own recitation of the stages of this action in the State courts, as well as the decision of the state court under review here, both clearly establish that the Indiana courts were not presented in this action the issue of the standards under which a trial court may override a jury recommendation against the death penalty. (Petition, p. 3; Schiro v. State Ind., 479 N.E.2d 556 (1985).)

The jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. Webb, supra; New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 at 67, 49 S.Ct. 61 at 63, 73 L.Ed. 184 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648 at 655, 17 S.Ct. 709 at 711, 41 L.Ed. 1149 (1897).

The Indiana Supreme Court was presented with and dealt with the issue whether the trial court could properly have considered Defendant's conduct both in the presence of and outside the presence of the jury. It was not presented with and naturally did not discuss the issue of the standards to be applied when a trial court overrides a jury recommendation.

Since the instant federal claim was not presented to the Indiana courts in the post-conviction relief proceeding under review here, jurisdiction does not arise to consider this issue.

II.

INDIANA'S SENTENCING PROCEDURE AND APPELLATE REVIEW WAS NOT WITHOUT ADEQUATE STANDARDS

The substantial issue which Petitioner attempted to raise concerns the standards to be employed in a trial court's override of the jury's recommended verdict, and the Indiana Supreme Court's standards in reviewing imposition of the death penalty.

At the outset, it should be noted that the irsue as framed by Petitioner begs the question: "whether, . . . a state may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty." (Brief, p. 4). Indiana does not have a procedure purporting to give its sentencing authority "unguided discretion". Indiana's capital sentencing procedure, Indiana Code § 35-50-2-9 follows, whether the judge accepts or rejects the jury's recommendation, the Court's stricture that the sentencing discretion must be "limited and reviewable". Gregg v. Georgia 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340.

In Spaziano, this Court first examined the procedure adapted by a small minority of states, including Indiana and Florida, allowing a trial court to override a jury's sentencing recommendation against the death penalty. It found that in such cases, where the judge remained the final sentencing authority, there was no Double Jeopardy violation. It found that the death penalty may be imposed either by juries alone, or by judges alone, or by the hybrid Florida-Indiana procedure which may be called "jury input, judge decision"; the Court declined to hold that there was "any one right way for a State to set up its capital-sentencing scheme". Spaziano, 104 S.Ct. at 3154. "If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the

advice of the jury. The advice does not become a judgment simply because it comes from the jury." Spaziano, supra, 104 S.Ct. at 3154.

Petitioner wishes to impose on trial court judges a "standard of review" of jury advice which is stricter than the standard of judgment demanded of judges who sentence without jury input. This contention is advanced on the theory that Spaziano decision allowing Florida jury override procedure did so because the Florida Supreme Court required adherence to a standard enunciated in Tedder v. State, Fla., 322 So.2d 908 (1975). But Spaziano acceptance of Florida's "jury-override" procedure did not at all rest on the existence of the "Tedder standard". Sections III and IV of the Spaziano opinion, 104 S.Ct. at 3161-3165 concluded that such schemes were permissible; Florida's courts' sentencing discretion was "limited and review able" and contained adequately--defined standards to rationally distinguish cases appropriate for capital punishment from other cases (including consideration by the sentence of the individual circumstances of the defendant, his background, and his crime); all without discussion of the "Tedder standard". Thus, it is clear that the validity of an advisory jury (override) system does not depend on use of the "Tedder standard". Discussion of Tedder arose only because the Petitioner in Spaziano challenged the application of that standard. Spaziano, supra, 104 S.Ct. at 3165. The Court did no more than note that Tedder afforded a "significant safeguard" and was taken seriously by the Florida courts. Then the Court added, "Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." 104 S.Ct. at 3166. The Court then considered Florida's scheme as follows:

> "We see nothing that suggests that the application of the jury-override procedure has resulted in arbicrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla. Stat. § 921.141(3) (Supp. 1984). The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously. § 921.14](4). As Justice STEVENS noted in Barclay,[4] there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overriden [sic] the jury's recommendation and sentenced the defendant to death. See Barclay v. Florida, ___ U.S., at ___, and n. 23, 103 S.Ct., at 3436, and n. 23 (opinion concurring in the judgment)."

Spaziano, supra, 104 S.Ct. at 3166. Indiana's trial-level and Supreme courts must adhere to the very same requirements. Indiana Code 35-50-2-9. All differences between Indiana's and Florida's sentencing scheme actually are to the benefit of the defendant: Indiana's list of aggravating circumstances is markedly more objective and fact-based than Florida's. Fla. Stat. Ann. § 921-141(5); Indiana Code § 35-50-2-9(b). And Indiana requires a threshold finding of existence of an aggravating circumstance to be established "beyond a reasonable doubt" before a death sentence may be considered, while Florida does not impose that strict standard of proof in its sentencing procedure.

Indiana's court-sentencing procedure therefore limits the trial judge by its adherence to a strict standard of proof of the existence of at least one specific, charged, statutorily-defined aggravating circumstance; requires every applicable mitigating circumstance to be weighed against it; and requires a

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[4] Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

specific factually based, reviewable written explanation of all factors considered by the court in its judgment. Such safeguards have consistently been held by this Court to ensure that the penalty is not imposed arbitrarily or capriciously. E.g., Proffitt v. Florida, 428 U.S. 242, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Petitioner goes on to attack the Indiana Supreme Court's standard of review. In particular, he contends that the Indiana Court's Rules for Appellate Review of Sentence, Rule 2 precludes "meaningful review" of the death penalty because under those rules the appellate court is to interfere only with sentences that are "manifestly unreasonable". He cites three cases for that proposition: "Judy v. State, Ind., 416 N.E.2d 95 (1981) at 107; Brewer v. State, Ind., 417 N.E.2d 889 (1981) at 899; and Williams v. State, Ind., 430 N.E.2d 759 (1982) at 765."

In fact, Petitioner's contention ignores an exhaustive discussion in his own direct appeal case of the actual standard of review used. Schiro v. State, Ind., 451 N.E.2d 1047 (1983). That discussion did quote the Appellate Review Rules, but in context these rules clearly do not limit the Indiana Court's review. To illustrate that context, and clearly demonstrate that Indiana's appellate review of the imposition of capital punishment is meaningful, it should suffice to quote the Schiro discussion in full:

> "We interpreted the United States Supreme Court's holding in Gregg v. Georgia, supra, a companion case to Proffitt, to be that the death penalty may be applied ". . . if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously." Brewer, supra, 417 N.E.2d at 897.
>
> It is clear that the imposition of the death sentence under Ind. Code § 35-50-2-9 is based upon the nature and circumstances of the crime and the character of the offender being sentenced. Judy, supra, 416 N.E.2d at 105. Also, this Court has

adopted a rule wherein it has exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment, or a minimum sentence of greater than ten years. Ind.R.App.P. 4(A)(7). Therefore, because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment, we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana.

In addition, rules adopted by this Court govern the appellate review of sentences:

> "Rule I
> AVAILABILITY--COURT
>
> (1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.
>
> (2) Appellate review of sentences under this rule may not be initiated by the State.
>
> (3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.
>
> Rule 2
> SCOPE OF REVIEW
>
> (1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
>
> (2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Ind.R.App.Rev.Sen. 1 and 2.

In all cases involving the finding of aggravating circumstances, the sentencing judge must include a statement of the reasons for selecting the sentence he imposes. This enactment, Ind.Code § 35-4.1-4-3 (§ 35-50-1A-3)(Burns Repl. 1979), reads as follows:

> "SENTENCING HEARING IN FELONY CASES.--Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and

call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) A transcript of the hearing;

(2) A copy of the presentence report; and

(3) If the court finds aggravating circumstances or mitigating circumstances a statement of the court's reasons for selecting the sentence that it imposes."

The above statute insures that in all instances where the death penalty is applied, the trial court judge must submit written findings indicating the aggravating factors he found to be present in imposing a sentence of death. This will guard against the influence of improper factors at the trial level and will make sure that the evils of Furman v. Georgia, (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, "arbitrary and capricious application" of the death penalty, were not present in the sentencing decision.

Not only do the trial court judge's written findings facilitate meaningful appellate review, this review is guaranteed to be thorough and adequate since we have before us the entire record of the proceedings, not just the sentencing hearing. Brewer, supra; Judy, supra. Thus, examination of the record, plus the sentencing hearing and the trial court's findings, protects each individual's constitutional rights.

Therefore, because of procedure mandated by statute, codified by rules, and controlled by cited precedent,

". . . this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures 'consistency, fairness, and rationality in the evenhanded operation' of the death penalty statute. Proffitt v. Florida, supra, 428 U.S. at 259-60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927. See Gregg v. Georgia, (1976) 428 U.S. 153, 194-95, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886-87. Cf. Woodson v. North Carolina, [428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944], supra; French v. State, [266 Ind. 276, 362 N.E.2d 834], supra. The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case. Therefore, we find our death sentencing procedures to be consistent and in full compliance with those required by the United States Supreme Court in Gregg v. Georgia and Proffitt v. Florida, and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution."

Judy, supra, 416 N.E.2d at 108.

We find no constitutional infirmities in the death penalty statute nor in the review that automatically follows the imposition of such sentence.

Schiro, 451 N.E.2d at 1052-1053."

Since the sentencing decision in Indiana is properly limited so as to ensure against arbitrary or capricious results, and meaningful appellate review is afforded, no basis is shown for granting of the writ.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issues alleged by Petitioner have been correctly disposed of in conformity with the opinions of this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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